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ORIGINAL

FALSE CLAIMS AMENDMENTS ACT OF 1986

JUNE 26, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GLICKMAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4827]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary to whom was referred the bill (H.R. 4827) to amend title 31, United States Code, with respect to the fraudulent use of public property or money, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "False Claims Amendments Act of 1986".

SEC. 2. FALSE CLAIMS.

Section 3729 of title 31, United States Code, is amended—

(1) by striking the matter preceding paragraph (1) and inserting the following: "(a) LIABILITY FOR CERTAIN ACTS.—Any person who—";

(2) in paragraph (4)—

(A) by striking "public"; and

(B) by striking "in an armed force" and inserting "by the United States Government";

(3) in paragraph (5)—

(A) by striking "in an armed force" and inserting "by the United States Government"; and

(B) by striking "or" after the semicolon;

(4) in paragraph (6)—

(A) by striking "a member of an armed force" and inserting "an officer or employee of the Government, or a member of the armed forces,"; and

(B) by striking the period at the end of the paragraph and inserting "; or"; and

(5) by adding at the end of the subsection the following:

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"(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government;

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, for an amount equal to consequential damages as set forth in subsection (b)(1) plus 2 times the amount of damages (other than such consequential damages) which the Government sustains because of the act of that person, and for the costs of a civil action brought to recover any such penalty or damages.

"(b) CALCULATION OF DAMAGES.—(1) For purposes of this section, consequential damages include damages which the United States would not have sustained but for—

"(A) the commission of any of the acts prohibited by subsection (a); or

"(B) entering into or making any contract or grant as a result, in any material part, of any false statement, record, or claim.

"(2) Any credits to which the defendant establishes entitlement may be deducted from the amount payable under subsection (a) only after the damages sustained by the United States have been doubled as set forth in subsection (a).

"(3) If any portion of the damages sustained by the United States under paragraph (1) is considered reasonably unforeseeable by the court, the court may reduce the total amount of damages payable under paragraph (1).

"(c) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information—

"(1) has actual knowledge of the information;

"(2) acts in deliberate ignorance of the truth or falsity of the information; or

"(3) acts in reckless disregard of the truth or falsity of the information.

"(d) CLAIM DEFINED.—For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.".

SEC. 3. CIVIL ACTIONS FOR FALSE CLAIMS.

Section 3730 of title 31, United States Code, is amended to read as follows:

"§ 3730. Civil actions for false claims

"(a) The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

"(b)(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. Subject to paragraph (5), an action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

"(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

"(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

"(4) Subject to paragraph (5), before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

"(A) proceed with the action, in which case the action shall be conducted by the Government; or

"(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

"(5)(A) If the court finds that an action brought by a person under this subsection—

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"(i) is based on specific evidence or specific information which the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or

"(ii) is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media,

the court shall dismiss the action, unless subparagraph (B) applies.

"(B) The court shall not dismiss an action under subparagraph (A)—

"(i) if the Government proceeds with the action before the expiration of the 60-day period described in paragraph (2) or any extensions obtained under paragraph (3); or

"(ii) if the Government was aware of the evidence or information described in subparagraph (A) or (B) for a period of at least 6 months before the person initiated the action, and the Government did not initiate a civil action on the matter involved within that 6-month period, or within such additional times as the court allows upon a showing of good cause.

"(C) The defendant must prove the facts warranting dismissal of a case to which this paragraph applies.

"(6) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

"(c)(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action. The person bringing the action shall have a right to continue in the action with the same rights as provided by Rule 24(a) of the Federal Rules of Civil Procedure. The Government is not bound by an act of the person bringing the action.

"(2) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines after a hearing, including the opportunity for presentation of evidence, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

"(3) Upon a showing of the Government that certain actions of discovery by the person initiating the action would significantly interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The Court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

"(4) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

"(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

"(d)(1) If the Government proceeds with an action under this section, and the person bringing the action discloses relevant evidence, or relevant information, which the Government did not have at the time the action was brought, such person shall receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds, under subsection (b)(5), to be based solely on evidence or information described in subparagraph (A) or (B) of that subsection, the court may award such sums as it considers appropriate, but in no case more than 10 percent of

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the proceeds, taking into account the significance of the evidence or information and the role of a person in advancing the case to litigation. Any payment under this paragraph shall be made from the proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

"(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

"(3) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, vexatious, or brought solely for purposes of harassment.

"(e) The Government is not liable for expenses which a person incurs in bringing an action under this section.

"(f)(1) If a claim has been filed under section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 601 and following), an action may not be brought under this section if that action is based on the same matter that is the subject of the claim, and a civil investigative demand may not be issued under section 3733 with regard to such claim. The prohibition of the preceding sentence shall be in effect until such time as the claim is finally resolved or, if an appeal is taken under section 7 or section 10 of the Contract Disputes Act of 1978, there has been a final decision on the merits. The running of the time allowed in section 3731(b) for bringing an action under this section shall be stayed during the period in which the prohibition in the first sentence of this paragraph is in effect.

"(2) If a suit was brought or such a demand was initiated before the contractor filed a claim under section 6 of the Contract Disputes Act of 1978, such suit or demand shall not be stayed, but only if the contractor knew or should have known of an investigation with respect to the matter, of the bringing of such suit, or of the initiation of such demand, before filing the claim under section 6 of such Act.

"(3) In any action under this section, if the court determines that a contractor has intentionally and deliberately filed a claim under section 6 of the Contract Disputes Act of 1978 for the purpose of delaying or otherwise hindering an action under this section, the contractor is liable for a penalty of not less than $5,000 and not more than $100,000.".

SEC. 4. ENTITLEMENT TO RELIEF FOR DISCRIMINATION BY EMPLOYERS AGAINST EMPLOYEES WHO REPORT VIOLATIONS.

Section 3730 of title 31, United States Code, as amended by section 3 of this Act, is further amended by adding at the end the following new subsection:

"(g) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer in whole or in part because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection."

SEC. 5. FALSE CLAIMS PROCEDURE.

Section 3731 of title 31, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) A civil action under section 3730 may not be brought—

"(1) more than 6 years after the date on which the violation of section 3729 is committed, or

"(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the

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United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

"(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

"(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.".

SEC. 6. FALSE CLAIMS JURISDICTION; CIVIL INVESTIGATIVE DEMANDS.

(a) IN GENERAL.—Subchapter III of chapter 37 of title 31, United States Code, is amended by adding at the end the following new sections:

"§ 3732. False claims jurisdiction

"(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

"(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

"§ 3733. Civil investigative demands

"(a) IN GENERAL.—

"(1) ISSUANCE AND SERVICE.—Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

"(A) to produce such documentary material for inspection and copying,

"(B) to answer in writing written interrogatories with respect to such documentary material or information,

"(C) to give oral testimony concerning such documentary material or information, or

"(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

"(2) CONTENTS AND DEADLINES.—

"(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

"(B) If such demand is for the production of documentary material, the demand shall—

"(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

"(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

"(iii) identify the false claims law investigator to whom such material shall be made available.

"(C) If such demand is for answers to written interrogatories, the demand shall—

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"(i) set forth with specificity the written interrogatories to be answered;

"(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

"(iii) identify the false claims law investigator to whom such answers shall be submitted.

"(D) If such demand is for the giving of oral testimony, the demand shall—

"(i) prescribe a date, time, and place at which oral testimony shall be commenced; and

"(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

Any such demand which is an express demand for any product of discovery shall not be returned or returnable until 20 days after the date on which a copy of such demand has been served upon the person from whom the discovery was obtained.

"(b) PROTECTED MATERIAL OR INFORMATION.—

"(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

"(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

"(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

"(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

"(c) SERVICE; JURISDICTION.—

"(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

"(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

"(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

"(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

"(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

"(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

"(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

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"(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

"(A) delivering an executed copy of such demand or petition to the person; or

"(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

"(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(f) DOCUMENTARY MATERIAL.—

"(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

"(A) in the case of a natural person, the person to whom the demand is directed, or

"(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

"(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

"(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

"(1) in the case of a natural person, the person to whom the demand is directed, or

"(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

"(h) ORAL EXAMINATIONS.—

"(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

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"(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person being examined, the person's counsel, the officer before whom the testimony is to be taken, and any other stenographer taking such testimony.

"(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

"(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

"(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript or send the transcript by registered or certified mail, to the custodian.

"(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness's testimony.

"(7) CONDUCT OF ORAL TESTIMONY.—(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

"(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

"(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

"(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

"(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

"(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—(A) The false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the

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custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

"(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

"(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress.

"(D) Notwithstanding subparagraph (C), documentary material, answers to interrogatories, or transcripts of oral testimony obtained under a civil investigative demand issued under this section shall be disclosed to an agency of the United States if—

"(i) that agency files, in a district court of the United States in which petitions under subsection (j) may be filed, and serves upon the person named in the civil investigative demand and, in the case of an express demand for any product of dicovery, the person from whom such discovery was obtained, a petition requesting such disclosure;

"(ii) any person so served has an opportunity to be heard on the petition;

"(iii) the court finds that disclosure of the information involved is relevant to an investigation by the agency which it is authorized by law to conduct; and

"(iv) the court issues an order requiring such disclosure.

The provisions of paragraphs (5) and (6) of subsection (j) (relating to jurisdiction and applicability of the Federal Rules of Civil Procedure) apply to petitions under this subparagraph.

"(E) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

"(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

"(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

"(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

"(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

"(A) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

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"(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made by the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

"(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

"(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

"(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

"(j) JUDICIAL PROCEEDINGS.—

"(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

"(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

"(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

"(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

"(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

"(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for

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an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

"(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

"(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

"(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

"(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

"(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

"(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

"(7) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

"(k) DEFINITIONS.—For purposes of this section—

"(1) the term 'false claims law' means—

"(A) this section and sections 3729 through 3732, and

"(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

"(2) the term 'false claims law investigation' means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

"(3) the term 'false claims law investigator' means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

"(4) the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

"(5) the term 'documentary material' includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

"(6) the term 'custodian' means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

"(7) the term 'product of discovery' includes—

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"(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

"(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

"(C) any index or other manner of access to any item listed in subparagraph (A).".

(b) CLERICAL AMENDMENT.—The table of contents for chapter 37 of title 31, United States Code, is amended by adding after the item relating to section 3731 the following:

"3732. False claims jurisdiction.
"3733. Civil investigative demands.".

SEC. 7. ADMINISTRATIVE REMEDY.

(a) Chapter 37 of title 31, United States Code, as amended by section 6 of this Act, is further amended by adding at the end the following:

"§ 3734. Administrative determination of liability for false claims and false statements

"(a) IN GENERAL.—An agency head may impose upon any person who violates section 3729 the penalties and damages set forth in that section, in accordance with the procedures set forth in this section. In addition, an agency head, in accordance with the procedures set forth in this section, may impose upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, with respect to any matter within the jurisdiction of that agency, a statement that the person knows or has reason to know—

"(1) asserts a material fact which is false or fraudulent; or

"(2) omits a material fact if—

"(A) as a result of such omission, such statement is false or fraudulent, and

"(B) the person making, presenting, or submitting such statement has a duty to include such material fact in the statement,

a civil penalty of not more than $10,000 for each such statement, in addition to any other remedy that may be prescribed by law.

"(b) DETERMINATIONS OF LIABILITY.—

"(1) INVESTIGATION.—The investigating official of an agency may investigate allegations that a person has violated section 3729 or has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), and shall (unless the allegations are determined to be without merit) report the results of such investigation to the reviewing official of the agency. Nothing in this subsection alters any responsibilities under section 4(d) of the Inspector General Act of 1978 of an investigating official to report expeditiously any criminal violations to the Attorney General.

"(2) REFERRAL TO PRESIDING OFFICER.—(A) If the reviewing official of an agency determines that there is adequate evidence to believe that a person has violated section 3729 or has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), the reviewing official shall, in accordance with subparagraphs (B) through (F), refer the allegations of such violation to a presiding officer of the agency for a hearing.

"(B) Before referring allegations of a violation to a presiding officer under subparagraph (A), the reviewing official of an agency shall transmit to the Attorney General a written notice of the intention of such official to refer such allegations and a statement of the reasons for such intention. Such notice shall include—

"(i) a statement of the reasons of the reviewing official for the referral of such allegations;

"(ii) a statement specifying the evidence which supports such allegations;

"(iii) a description of the claim, record, statement, or other act for which liability under section 3729 or subsection (a) is alleged;

"(iv) an estimate of the amount of money or the value of property or services requested or demanded in violation of section 3729; and

"(v) a statement of any exculpatory or mitigating circumstances which may relate to the claim, record, statement, or other act involved in the alleged violation.

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"(C) A reviewing official may refer allegations of a violation to a presiding officer if—

"(i) the Attorney General approves the referral of such allegations; or

"(ii) the Attorney General takes no action to disapprove the referral of such allegations—

"(I) within 90 days after the date on which the Attorney General receives the notice required by subparagraph (B); or

"(II) within such period as may be provided in a memorandum of understanding entered into by the agency head involved and the Attorney General with respect to such allegations.

"(D) A reviewing official may not refer allegations to a presiding officer under this paragraph if the Attorney General transmits a written statement to the reviewing official which specifies that the Attorney General disapproves the referral of the allegations and states the reasons for such disapproval.

"(E) If the Attorney General transmits to an agency head a written finding that the continuation of any hearing under subsection (c) may adversely affect any pending or potential criminal or civil action related to an alleged violation of section 3729 or of section 1001 of title 18, the hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.

"(c) HEARINGS.—

"(1) NOTICE OF HEARING.—A reviewing official who refers under subsection (b) allegations of a violation by a person of section 3729, or allegations that a person has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), shall give notice to the person, in accordance with section 554(b) of title 5, of the hearing to be conducted with respect to those allegations. The reviewing official shall prosecute the case on behalf of the agency.

"(2) CONDUCT OF HEARING.—The presiding officer shall conduct a hearing on the record regarding any allegation of a violation by a person of section 3729, or any allegation that a person has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), which is referred to the presiding officer by the reviewing official under subsection (b) in order to determine—

"(A) whether the person committed the violation; and

"(B) the amount of any penalty or damages to be assessed against such person.

Any such determination shall be based on a preponderance of the evidence.

"(3) APPLICABILITY OF TITLE 5 PROCEDURES.—The provisions of subchapter II of chapter 5 of title 5 shall apply to each hearing conducted under paragraph (2).

"(4) RESOLUTION UNDER CONTRACT DISPUTES ACT.—

"(A) If a claim has been filed under section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 601 and following), a hearing with respect to the same matter that is the subject of the claim may not be conducted under this section. The prohibition of the preceding sentence shall be in effect until such time as the claim is finally resolved or, if an appeal is taken under section 7 or section 10 of the Contract Disputes Act of 1978, there has been a final decision on the merits. The running of the time limitations in subsection (h) shall be stayed during the period in which the prohibition in the first sentence of this paragraph is in effect.

"(B) If a hearing under this section was initiated before a claim was filed under section 6 of the Contract Disputes Act of 1978, the hearing shall not be stayed, but only if the contractor knew or should have known of an investigation with respect to the matter, or of the initiation of the hearing, before filing a claim under section 6 of such Act.

"(d) SUBPOENA AUTHORITY.—

"(1) OF INVESTIGATING OFFICIALS.—For the purpose of an investigation under subsection (b)(1), an investigating official is authorized to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data not otherwise reasonably available to the agency involved.

"(2) OF PRESIDING OFFICERS.—For the purpose of conducting a hearing under subsection (c)(2), a presiding officer is authorized to require by subpoena the attendance and testimony of witnesses and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the presiding officer considers relevant and material to the hearing.

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"(3) ENFORCEMENT OF SUBPOENAS.—The provisions of section 555(d) of title 5 shall apply to any subpoena issued under this subsection.

"(e) PROCEEDINGS AGAINST BENEFICIARIES OF FEDERAL PROGRAMS.—

"(1) REQUIREMENT FOR DETERMINATION OF VIOLATION.—An individual may be determined under this section to have violated section 3729, or to have made, presented, or submitted, or caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), with respect to benefits received by that individual only if that individual, at the time of the conduct constituting the violation, had actual knowledge that the conduct was false or fraudulent.

"(2) AMOUNT OF MONEY IN VIOLATION.—Allegations of liability under section 3729 by an individual, or of a false or fraudulent statement made, presented, or submitted, or caused to be made, presented, or submitted, by an individual, with respect to benefits received by that individual may not be referred to a presiding officer under subsection (b)(2) unless the reviewing official determines that the dollar amount of benefits received in violation of section 3729 or as a result of the false or fraudulent statement exceeds $15,000. In 1988 and annually thereafter, the $15,000 limit in the preceding sentence shall be adjusted by the Attorney General in accordance with the Consumer Price Index.

"(3) ATTORNEY FEES.—Any individual whose conduct is the subject of a hearing under this section with respect to benefits received by that individual, who is financially unable to obtain adequate representation, and who is otherwise unable to obtain counsel may petition the presiding officer for compensation of private counsel retained by that individual. The presiding officer shall award such compensation in accordance with the financial eligibility standards and the payment rates established under section 3006A of title 18 for persons financially unable to obtain adequate representation. Such compensation shall be paid from any funds made available to the agency involved.

"(4) DEFINITION.—For purposes of this subsection, the term 'benefits' means—

"(A) benefits under the supplemental security income program under title XVI of the Social Security Act;

"(B) old age, survivors, and disability insurance benefits under title II of the Social Security Act;

"(C) benefits under title XVIII of the Social Security Act;

"(D) aid to families with dependent children under a State plan approved under section 402(a) of the Social Security Act;

"(E) medical assistance under a State plan approved under section 1902(a) of the Social Security Act;

"(F) benefits under title XX of the Social Security Act;

"(G) benefits under the food stamp program as defined in section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. 2412(h));

"(H) benefits under laws administered by the Veteran's Administration;

"(I) benefits under the Black Lung Benefits Act;

"(J) benefits under the special supplemental food program for women, infants, and children under section 17 of the Child Nutrition Act of 1966;

"(K) benefits under section 336 of the Older Americans Act;

"(L) any annuity or other benefit under the Railroad Retirement Act of 1974;

"(M) benefits under subchapter III of chapter 83 of title 5; and

"(N) benefits under any other Federal program which has a purpose similar to those programs described in subparagraphs (A) through (M) of providing for income, health, nutrition, or social services needs,

which are intended for the personal use of the individual who receives the benefits or of a member of the individual's family. The Attorney General shall, after notice and an opportunity for the submission of public comments, publish a list of those programs described in subparagraph (N).

"(f) JUDICIAL REVIEW.—Any person who is determined under this section to have violated section 3729 or to have made, presented, or submitted, or to have caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a) may obtain review of that determination in the United States district court for the district in which the person resides or in which the violation occurred, or in the United States District Court for the District of Columbia. The provisions of chapter 7 of title 5 shall apply to such review.

"(g) COLLECTION OF CIVIL PENALTIES.—

"(1) CIVIL ACTION FOR RECOVERY.—Any penalty or damages assessed in a determination under this section which has become final may be recovered in a civil action brought by the Attorney General in the appropriate district court of the

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United States. In any such action, any matter that was raised or that could have been raised in a hearing conducted under subsection (c) or pursuant to judicial review under subsection (f) may not be raised as a defense, and the determination of a violation and the determination of amounts of penalties or damages shall not be subject to review.

"(2) CONSOLIDATION OF ACTIONS.—Any action under paragraph (1) may, without regard to venue requirements, be joined and consolidated with, or asserted as a counterclaim, cross-claim, or setoff by the United States in, any other civil action which includes as parties the United States and the person against whom the action under paragraph (1) is brought.

"(3) COMPROMISE AUTHORITY.—The Attorney General shall have exclusive authority to compromise or settle any penalty or damages the determination of which is the subject of a pending appeal under subsection (f) or a pending action to recover such penalty or damages under this subsection.

"(4) DEPOSIT OF PENALTIES COLLECTED.—Any amount of penalty or damages collected under this section shall be deposited in the miscellaneous receipts of the Treasury of the United States, except that any such amount collected by the United States Postal Service shall be deposited in the Postal Service Fund established by section 2003 of title 39.

"(h) LIMITATIONS.—

"(1) ON LIABILITY.—A person shall not be subject to any penalty or damages under this section—

"(A) more than 6 years after the date on which the acts of that person referred to in subsection (a) occur, or

"(B) more than 3 years after the date when facts material to warrant proceedings under this section against that person are known or reasonably should have been known by the official within the agency charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the acts of that person referred to in subsection (a) occur,

whichever occurs last.

"(2) ON ACTIONS TO RECOVER PENALTIES.—A civil action to recover a penalty or damages under subsection (g) may not be brought more than 3 years after the date on which the determination of liability for such penalty or damages becomes final.

"(3) REPORTING OF ADDITIONAL INFORMATION.—If at any time during the course of proceedings brought under this section the agency head involved receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim, statement, or record or other activity prohibited by section 3729, or in relation to a statement described in subsection (a), the agency head shall immediately report such information to the Attorney General, and in the case of an agency in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, to the Inspector General of that agency.

"(i) REGULATIONS.—Each agency head shall issue such regulations as are necessary to implement the provisions of this section.

"(j) RIGHT TO SETOFF.—

"(1) IN GENERAL.—The amount of any penalty or damages the determination of which has become final under this section, or for which a judgment has been entered under subsection (f) or (g), or any amount agreed upon in a settlement or compromise under subsection (g)(3), may be deducted from any sum then or later owing by the United States to the person liable for such penalty or damages, unless otherwise prohibited by law and except in a case in which the Federal Government has agreed by contract not to exercise any rights of setoff the Government has.

"(2) NOTICE.—The agency head involved shall transmit written notice to the person liable for such penalty or damages before commencing a deduction or series of deductions under this subsection.

"(3) DEPOSIT OF AMOUNTS.—All amounts retained under this subsection shall be remitted to the Secretary of the Treasury for deposits in accordance with subsection (g)(4).

"(4) NOTIFICATION OF THE SECRETARY OF THE TREASURY.—An agency head may forward a certified copy of any determination as to liability for any penalty or damages which has become final under this section, or a certified copy of any judgment which has been entered under subsection (f) or (g), to the Secretary of the Treasury for action in accordance with this subsection.

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"(k) DEFINITIONS.—For purposes of this section—

"(1) the term 'agency' means an agency as defined in section 551 of title 5;

"(2) the term 'agency head' means—

"(A) the head of an agency, or

"(B) an officer or employee of the agency designated, in regulations promulgated by the head of the agency, to act on behalf of the head of the agency;

except that, in the case of a military department, 'agency head' means the Secretary of Defense;

"(3) the term 'investigating official' means—

"(A) in the case of an agency in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, the Inspector General of that agency;

"(B) in the case of a military department, the Inspector General of the Department of Defense or an officer or employee within the military department designated by the Inspector General;

"(C) in the case of any other agency, any officer or employee of the agency designated by the agency head to conduct investigations under subsection (b)(1) of this section; and

"(4) the term 'reviewing official' means any officer or employee of an agency—

"(A) who is designated by the agency head to make determinations required by subsection (b)(2)(A) of this section;

"(B) who, if a member of the Armed Forces of the United States on active duty, is serving in a pay grade of O-7 or higher or, if a civilian emplcyee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay payable for grade GS-16 of the General Schedule; and

"(C) who—

"(i) is not subject to supervision by, or required to report to, the investigating official; and

"(ii) is not employed in the organizational unit of the agency in which the investigating official is employed; and

"(5) the term 'presiding officer' means—

"(A) an administrative law judge appointed under section 3105 of title 5; or

"(B) if such an administrative law judge is not available to an agency, an official designated by the agency head who performs functions comparable to and in a similar manner as administrative law judges appointed under section 3105 of title 5, and is selected, compensated, and otherwise treated in a similar manner as such administrative law judges.".

(b) CLERICAL AMENDMENT.—The table of contents for chapter 37 of title 31, United States Code, as amended by section 6(b) of this Act, is further amended by adding at the end the following new item:

"3734. Administrative remedy.".

SEC. 8. CRIMINAL PENALTIES.

Section 287 of title 18, United States Code, is amended by striking "five" and inserting "ten".

SEC. 9. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this Act and the amendments made by this Act take effect on the date of the enactment of this Act.

(b) SECTION 7.—(1) Except as provided in paragraph (2), the amendments made by section 7 take effect 180 days after the date of the enactment of this Act.

(2) Section 3734(i) of title 31, United States Code (as added by section 7 of this Act), takes effect on the date of the enactment of this Act.

I. PURPOSE

The purpose of H.R. 4827 is to amend the existing civil false claims statute in order to strengthen and clarify the government's ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud.

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II. Summary of the Bill

H.R. 4827, the False Claims Amendments Act of 1986, increases the civil penalties available under current law from $2,000 to not less than $5,000 and not more than $10,000, and also provides for recovery of consequential damages.

The bill defines the terms "knowing" and "knowingly", and the term "claim". The current law contains no definition of these terms and has therefore resulted in different interpretations among the Circuit Courts of Appeals.

The bill amends the *qui tam,* or citizen suit, provisions of the existing statute to: expand the role of the *qui tam* plaintiff; increase the awards payable to the *qui tam* plaintiff; and to provide whistleblower protections for those employees who are discriminated against by their employers for participation or involvement in a *qui tam* action.

Other amendments contained in the bill expand the jurisdiction of the Government in False Claims Act cases, and grant the Federal District Courts jurisdiction over state claims for recovery of funds if the State claim arises from the same transaction as that involved in the Federal claim.

Additionally, the bill creates a pre-lawsuit discovery mechanism, Civil Investigative Demands, to increase the Government's ability to investigate False Claims Act cases and includes the creation of an administrative remedy for False Claims Act cases, which may be prosecuted by the agency involved under certain conditions as outlined in that section.

Finally, the bill amends section 287 of title 18, to increase the time of imprisonment for persons convicted under the criminal false claims statute.

III. Background

The False Claims Act (title 31, section 3729, et seq.) was originally enacted in 1863 because of reports of widespread corruption and fraud in the sale of supplies and provisions to the Union government during the Civil War. As originally enacted, the statute imposed civil and criminal liability for: presenting false claims against the Government; preparing a written instrument that contained fraudulent or fictitious statements with the purpose of aiding in the payment or approval of such a claim; and conspiring to defraud the Government by obtaining payment of allowance of a false claim. It also provided for *qui tam* suits, that is, suits by individuals to recover funds fraudulently taken from the Government.

With two exceptions, amendments made to the *qui tam* provisions in 1943 and a recodification of the Act in 1982, the statute has been largely unchanged since enacted 123 years ago.

Because of this lapse of time, some of the provisions of the Act are outdated. For example, the current law permits the United States to recover double damages plus $2,000 for each false or fraudulent claim. This penalty has not been changed since 1863. The Congressional Research Service has reported that, based on the Consumer Price Index, the buying power of $2,000 in 1863 would be close to $18,000, today.

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Although the Government may also pursue common law contract remedies, the False Claims Act is a much more powerful tool in detering fraud and is used as the primary vehicle by the Government for recouping losses suffered through fraud. Thus, it is important that it be an effective tool for recouping these losses.

Evidence of fraud in Government programs and procurement is on a steady rise. In 1984, the Department of Defense conducted 2,311 fraud investigations, an increase of 30% from 1982. The Department of Health and Human Services has nearly tripled its prosecution referrals of fraud involving entitlement programs over the past three years.

It is also important to recognize that detected fraud is an imprecise measure of how much actual fraud exists. In a 1981 study, the General Accounting Office (GAO) found that most fraud goes undetected. GAO found that due to weak internal controls and the fact that government auditors do not pay adequate attention to possible fraud, many fraud cases have gone undetected. The study goes further and states that, of the fraud that is detected, the Government prosecutes and recovers its losses in only a small percentage of cases. According to the GAO study, the Department of Justice states that the reasons for the lack of prosecution are the inadequacy of the evidence; the lack of prosecutive merit or jury appeal; and the insignificant dollar amounts involved in many of these cases. One reason cited by the Department for the low rate for recovery of losses was the inability to collect judgments.

It is unknown just how much public money is lost to fraud. Estimates by the General Accounting Office, Department of Justice, and the Inspectors General, who have studied the issue, range from hundreds of millions of dollars to more than $50 billion per year.

In hearings held before the Subcommittee on Administrative Law and Governmental Relations, numerous witnesses pointed out that a large part of the problem in prosecuting civil fraud cases relates to the ambiguities and lack of clarity in the current law. Among those provisions of the current law which have evolved through case law into an ambiguous standard are the burden of proof required of the United States to prove a violation; the standard of proof for such cases; and the manner in which damages are to be calculated.

H.R. 4827 removes the ambiguities from the existing law so as to allow for a more uniform application of its provisions. It will therefore enable the Government to more easily investigate and successfully prosecute fraud cases and to thus recoup its losses.

The Committee feels that active enforcement of this statute will not only result in a recovery of losses resulting from fraud, but that it will also serve as a deterrent to those who otherwise might consider defrauding the Government. Moreover, given the current budgetary situation, it is imperative that the Government recoup these fraud losses and deter future fraudulent activities which result in further losses to the Government.

H.R. 4827 also provides new investigatory and enforcement powers to the Executive Branch which the Committee believes will enhance the Government's ability to detect fraud and to allow the agency involved to handle some cases through an administrative

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remedy. This new administrative remedy will save the Government both the additional time and expenses involved in a court action.

The Committee believes that the amendments in H.R. 4827 will substantially strengthen the Government's ability to deter fraud and to regain financial losses resulting from fraud. Therefore the Committee favorably reports H.R. 4827, as amended, to the House.

IV. Committee Consideration

On February 5, and 6, 1986, the Subcommittee on Administrative Law and Governmental Relations held hearings on the issue of proposed amendments to the False Claims Act. Witnesses who testified before the Subcommittee were: Senator Charles E. Grassley; Congressmen Andy Ireland, Berkley Bedell, Hamilton Fish, Jr., Dennis M. Hertel, and Fortney H. (Pete) Stark; Mr. John M. Gravitt, accompanied by Mr. Jim Helmer; Mr. John Phillips, Executive Director for the Center for Law in the Public Interest; Marshall J. Breger, Chairman, Administrative Conference of the United States; Ms. Karen Hastie Williams, Chairman, Legislative Liaison Committee of the Public Contract Law Section of the American Bar Association; Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice; Richard P. Kusserow, Inspector General, Department of Health and Human Services; Howard Cox, Deputy Assistant Inspector General for Criminal Investigation Policy, Department of Defense; Christopher Cross, representing the U.S. Chamber of Commerce; Frank Menaker, Vice President and General Counsel, Martin Marietta Corporation, accompanied by Paul Besozzi, Partner, Law Firm of Hennessey, Stambler, and Siebert, representing the Aerospace Industries Association of America.

On Wednesday, April 23, 1986, and Tuesday, May 6, 1986, the Subcommittee on Administrative Law and Governmental Relations held a markup of the bill, H.R. 4560. Numerous amendments were favorably considered and a clean bill, H.R. 4827, was reported favorably to the full Committee.

On May 20, and June 10, 1986, the Committee considered H.R. 4827. On June 10, 1986, the Committee reported the bill favorably to the House with a single amendment in the nature of a substitute.

V. Major Issues Discussion

MILITARY EXEMPTION

Under the current provisions of the False Claims Act, a member of the armed forces is exempt from liability. When the statute was first enacted in 1863, military penalties were much harsher than the penalties available under the false claims statute. For example, the Act provided that any person in the Army, Navy, or militia who was charged with submitting a false claim, could be held for trial by court martial and, if found guilty, punished by any level of fine or imprisonment. Only the death penalty was precluded. One purpose of the false claims statute is to provide the Government with a mechanism to recoup losses suffered through fraud, and current military penalties do not provide for the recovery of losses suffered when a member of the armed forces defrauds the Govern-

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ment. It should also be noted that a large number of fraud cases and many of the larger-dollar cases arise out of Department of Defense contracts. Hence, the Committee felt that for the amendments contained in this bill to be truly effective, members of the armed forces should no longer be exempt from liability under the statute.

In addition to the exemption for members of the armed forces, the current law limited many of the actions prohibited by the Act to fraud involving only military contracts and procurement. Because fraud perpetrated against the Government is clearly not limited to only the military, the language describing the prohibited conducts was rewritten to make it apply to the entire Government.

REVERSE FALSE CLAIMS

Another amendment to the current law contained in H.R. 4827 allows the Government to prosecute a false claim which has been filed for the purpose of reducing the amount the claimant owes to the Government. Under the current statute, case law has held that the statute did not provide for liability in such a situation. The Committee felt that there is no reason to treat a false claim filed against the Government to fraudulently reduce an obligation owed to the Government differently from one filed for the purpose of fraudulently obtaining money. The Government should have the ability to collect all losses suffered through fraud.

DAMAGES RECOVERABLE

Pursuant to the provisions of H.R. 4827, the Government is entitled to recover a civil penalty of not less than $5,000 nor more than $10,000 per claim; double the amount of actual damages suffered by the Government; consequential damages; and the costs of a civil action brought to recover such damages. Consequential damages recoverable are not to be included in the damages that are doubled. The Committee recommends this change in order that the False Claims Act penalties will have a strong deterrent effect; will make the Government whole for its losses; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation.

H.R. 4827 provides that any credits to which the defendant may be entitled are not to be deducted from the amount payable until after actual damages have been doubled. The bill also provides that in the event that the court determines that any portion of the consequential damages sustained by the Government were reasonably unforeseeable by the defendant, the court may reduce the total amount of damages payable.

KNOWLEDGE STANDARD

A major problem that has been encountered in the prosecution of fraud by the Government under the current law concerns the appropriate standard of knowledge necessary for a violation of the Act. The current law contains no definition of the words "knowing" and "knowingly", even though the statute uses both terms. There is no doubt that actual knowledge of a claim's falsity will

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confer liability under the statute. However, courts have in the past reached different opinions in defining what type of "constructive knowledge", if any, will result in liability.

H.R. 4827 clarifies this problem by defining "knowing" or "knowingly" as meaning: (1) actual knowledge of the information; (2) deliberate ignorance of the truth or falsity of the information; or (3) reckless disregard of the truth or falsity of the information.

By adopting this definition of knowledge, the committee intends not only to cover those individuals who file a claim with actual knowledge that the information is false, but also to confer liability upon those individuals who deliberately ignore or act in reckless disregard of the falsity of the information contained in the claim. It is intended that persons who ignore "red flags" that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act. This definition, therefore, enables the Government not only to effectively prosecute those persons who have actual knowledge, but also those who play "ostrich".

CLAIM DEFINED

Under the provisions of H.R. 4827, a new section defines the term "claim". This new section recognizes that a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of a contract term, a statute, or a regulation. Similarly, the new definition clearly covers false claims for reimbursement under the Medicare, Medicaid, or similar programs, as well as a false application for a loan from a government agency.

Such claims may be false, even though services are provided as claimed, if, for example, the claimant is ineligible to participate in the program. They may also come under this definition if, by means of false statements, the government was induced to lend an inflated amount to an applicant.

Under this definition, each separate bill, voucher, or other "false payment" demand constitutes a separate claim for which a forfeiture shall be imposed. This is true although a number of such claims may be submitted to the Government at one time. For example, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct constitutes a false claim.

A claim upon any Government agency or instrumentality, quasi-governmental corporation, or nonappropriated fund activity is a claim upon the United States under the Act. In addition, claims or false statements made to a party other than the Government are covered by this term if payment thereon would ultimately result in a loss to the United States.

PROVISIONAL RELIEF

One section which was deleted from the bill during Committee consideration provided for provisional relief. This section would have given the Government the right to seek injunctive or provi-

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sional relief in order to prevent a defendant from squandering, hiding, or transferring his assets and therefore becoming judgment-proof prior to resolution of a fraud case.

The Committee considered the provisions contained in the bill and noted that the Government had injunctive relief available under the Federal Rules of Civil Procedure. Since the provisions in the bill adopted a different standard for entitlement to injunctive relief, it was the opinion of the Committee that the Government should utilize the relief available under existing law, such as the Federal Rules of Civil Procedure, rather than create a new or different standard.

By deleting this provision, it was not the intent that the Government be precluded from seeking injunctive or provisional relief, but rather that existing laws under which the Government currently seeks such relief are adequate.

QUI TAM ACTIONS

The original False Claims Act contained a provision allowing private persons, or "relators", to bring suits under the Act. The statute provided that a suit "may be brought and carried on by any person as well for himself as for the United States". Therefore, under the provisions of the original Act, suits to redress frauds against the Government could be instituted as easily by a private individual as by the Government's representative.

Also, under the original act, there was no provision for the Government to take over the action, or for any other person to interfere with the prosecution of such an action brought by a relator.

In the early 1940s, several *qui tam* actions were brought regarding World War II defense procurement fraud. Some of these suits appeared to be based primarily on criminal indictments which had already been brought by the Government. In one such suit, *United States ex rel Marcus* v. *Hess*, 317 U.S. 537 (1943), the Government contended that an action brought by an informer who based his civil action on a criminal indictment should be barred under the provisions of the False Claims Act because he brought no information of his own to the suit, thereby thwarting the intent of the Act. The Government also contended that such suits created a race to the courthouse between the Government's civil lawyers and private parties, and infringed on the Attorney General's control over criminal and civil fraud actions. The Court rejected the Government's arguments and ruled that the statute did not require that the relator base his suit on information he himself provided or that the Attorney General should have exclusive control over the Government's civil fraud litigation.

Because of the ruling in *Marcus* v. *Hess*, the *qui tam* provisions of the False Claims Act were amended in 1943 to preclude *qui tam* suits that are based on information in the Government's possession, even though the Government may have had the information for a long time but had taken no action on this information.

The Committee recognizes the validity of the reasons for enactment of the 1943 amendments. Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in

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which the Government took no action. Therefore, H.R. 4827 contains a provision which states that a *qui tam* action which is based solely on public information, such as congressional hearings, the news media, or criminal indictments, shall be dismissed. However, if the Government had had the information for six months before the *qui tam* action was filed, the section provides that the *qui tam* suit shall not be dimissed solely because the Government has not brought the case.

As an additional deterrent to unwarranted suits, the bill also provides that when a *qui tam* suit is based solely on public information, the award available to the relator may not exceed 10%. This limitation applies only to *qui tam* cases in which the Government enters the suit.

The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward. Since testimony heard during the Subcommittee hearings indicates that the Government may not know of a fraud, but for a *qui tam* suite, it is felt that a *qui tam* plaintiff should have some additional incentives for bringing these actions. Therefore, H.R. 4827, increases the awards payable to the relator. It also provides "whistleblower" protections to those employees who put their jobs on the line by bringing such an action and/or participating in such.

Specifically, the bill provides for the relator to receive awards from the proceeds of the action between 15% and 30%, depending on the degree of contribution the relator makes to the prosecution of the case, the nature and extend of the information provided by the relator, and whether the Government enters the action. The current law provides for an award of not more than 10% if the Government enters the action, and not more than 25% if the Government does not enter and the relator proceeds with the action alone.

Under current law, there is no federal whistleblower protection statute for persons who are fired or otherwise discrimiated against by their employer because of their lawful participation in a False Claims Act case. Often, the employee within the company may be the only person who can bring the information forward. If the person stands to lose his job, he may be unwilling to expose company fraud. H.R. 4827 provides protections for those who are willing to expose fraud. Specifically, the bill provides that the employee may be reinstated with double back pay with interest. It also authorizes the possible recovery of special damages, such as litigation costs and attorneys fees. It should be noted that the interest payable is to be calculated before the back pay is doubled. The employee would have to prove discrimination in court in order to recover under this provision.

Other provisions included in the bill involve the degree of participation of the relator if the Government enters the action. During the hearings, testimony was received from a Mr. John Gravitt of Cincinnati, Ohio. Mr. Gravitt was an employee of General Electric, Evendale Plant, who became aware that the company was defrauding the Government by falsifying time cards. Mr. Gravitt ultimately filed a *qui tam* action against General Electric, and he recited the problems he had encountered with the Government in

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attempting to prosecute this case. For example, in Mr. Gravitt's case, the Government entered the action and therefore took over prosecution. Mr. Gravitt was then precluded from conducting his own discovery and complained that, in his opinion, the civil fraud case was not adequately investigated before the Government attempted to settle the case. John Phillips, Executive Director, Center for Law on the Public Interest, also testified at the hearing and he raised concerns similar to those outlined by Mr. Gravitt.

In order to solve the problems with the current law as outlined by Mr. Gravitt and Mr. Phillips, the Committee bill expands the role of the relator so that when the Government enters an action filed by a relator, the relator remains a party to the suit with the same rights as if he had been an intervenor of right under Rule 24(a), Federal Rules of Civil Procedure.

The Government remains the primary litigant and has control of the litigation, but under this provision, the relator has access to all documents filed with the court, as well as the right to conduct discovery.

Because of concerns that discovery conducted by the relator may interfere with discovery being conducted by the Government, the provisions allows the Court to stay discovery being conducted by the relator, if the Government can show that such discovery would significantly interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts. Such discovery may not be stayed for longer than 60 days without a showing by the Government that the criminal or civil investigation is being pursued with diligence.

This provision also allows the Government to settle the action notwithstanding the objections of the relator if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. The Committee felt that it was important that the court consider the issue of whether the proposed settlement was reasonable, if the relator objects, and that this could best be accomplished after a hearing which includes the opportunity for all parties to present evidence on the issue.

The section further provides that, notwithstanding the filing of a *qui tam* action, the Government may pursue its claim through alternate remedies available to it, such as a criminal prosecution or an adjudication under the administrative remedy section of this Act. If the Government elects to pursue an alternate remedy, however, the rights of the relator shall be protected, and he shall have the same rights as in the civil action.

However, the Committee does not intend that a person alleged to have violated the Act, be forced to defend himself in two forums at one time. Therefore, the section provides that any finding or fact or conclusion of law made in such alternate remedy shall be conclusive on all parties.

CONTRACT DISPUTES ACT

The Contract Disputes Act of 1978 was enacted to provide an expedited mechanism for resolving good faith disputes with the Federal government for businesses which contract with the Govern-

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ment. The Committee was concerned that by strengthening the False Claims Act and increasing the penalties and damages available to the Government under the Act, that the Government might use it as a club to intimidate small businesses into not filing claims for good faith disputes under the Contract Disputes Act.

Therefore, the Committee added an amendment to H.R. 4827 which would prevent the Government from filing a false claims action regarding the same matter that is already the subject of a Contract Disputes Act claim. The amendment preserves the Government's ability to bring an action under the False Claims Act after the Contract Disputes Act claim is resolved. It does so by tolling the statute of limitations until the contract dispute has been finally resolved. However, the Committee wanted to ensure that contract disputes will not be filed for the purpose of delaying false claims actions. Therefore, if the Court determines that the Contract Disputes Act claim was intentionally filed for the purpose of delaying a false claims action, the false claims suit will not be stayed and the Court shall impose a fine of not less than $5,000 and not more than $100,000 on the delaying party. The range of the penalty was inserted in order to allow discretion by the court in determining the appropriate amount of penalty, taking into account the circumstances surrounding the filing of the claim, the amount of money involved in the suit, and the size of the company involved.

STATUTE OF LIMITATIONS

H.R. 4827 expands the statute of limitations in the False Claims Act. Under current law, the statute of limitations is to be not more than six years after the date of the occurrence of the violation. H.R. 4827 provides that the statute of limitations shall be not more than six years (as provided by current law), nor more than three years after the date when the material facts of the violation are known or should have been known by the official of the United States with responsibility to act, but no action may be brought more than 10 years after the occurrence of the violation.

It was brought to the attention of the Committee that fraud is often difficult to detect and that the statute of limitations should not preclude the Government from bringing a cause of action under this Act if they were not aware of the fraud. The Committee agreed that this was unfair and so expanded the statute of limitations. However, the Committee did not intend to allow the Government to bring fraud actions *ad infintum*, and therefore imposed the strict 10 year limit on False Claims Act cases.

BURDEN OF PROOF

The current law does not delineate what standard of proof is necessary to prove a case under the Act. This silence has resulted in varying degrees of proof being required by different courts. For example, some courts have required the United States to prove its case by "clear and convincing" or even by "clear, unequivocal and convincing" evidence, which is the functional equivalent of a criminal statute. The False Claims Act is basically a remedial statute, and hence, "preponderance of the evidence", the ordinary civil

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degree of proof, is considered by the Committee to be the appropriate level.

NOLO CONTENDERE PLEAS

Another new provision to the False Claims Act incorporated in H.R. 4827 provides that a *nolo contendere* plea in a criminal prosecution would estop a defendant from denying liability in a civil suit involving the same transaction. The Committee determined that it was unfair to the Government to allow defendants who are cheating the Government by making false claims to enter a plea of *nolo contendere* in a criminal case and then force the Government to litigate the same issue for civil purposes.

CIVIL INVESTIGATIVE DEMANDS

Fraud actions, by nature, are difficult to piece together. Rarely does a defendant admit to fraud, and a clean paper trail of fraudulent action is often very difficult to trace. Circumstantial evidence and witness testimony is critical to a determination in a fraud case, and is generally necessary in determining whether fraud has been committed. For these reasons, the Committee bill would authorize the use of Civil Investigative Demands.

Civil Investigative Demands (CIDs) are a pre-lawsuit discovery mechanism, which provides the Government with the ability to investigate allegations of fraud *prior* to the filing of a civil case.

Currently, the Government must make a determination whether to file a civil fraud case based on sketchy information. Often, the Government files a suit and institutes discovery and only then discovers that there is not enough evidence to pursue the case. The Committee determined that the use of CIDs would enable the Government to determine whether enough evidence existed to warrant the expense of filing suit, as well as to prevent the potential defendant from being dragged into court unnecessarily.

The CID provisions contained in H.R. 4827 allow the Government to issue civil investigative demands for documentary and testimonial information. The CID may be issued only after review and consent by the Attorney General. (This authority may *not* be delegated.) The Committee does not intend that CIDs be issued in every potential civil fraud case, but only in those instances where it is absolutely necessary to determine whether a fraud action under the Act is appropriate. It is expected by the Committee that the Attorney General will make an independent review of cases in which the Department wishes to issue CIDs and determine whether such is necessary before consenting to the use of a CID.

The CID provisions contained in H.R. 4827 are similar to those available to the Anti-Trust Division of the Department of Justice under the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, 15 U.S.C. 1311-1314.

ADMINISTRATIVE REMEDY

A new section included in H.R. 4827 creates an administrative remedy for certain actions under the False Claims Act.

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In many instances, the agency is the first body within the Government to become aware of fraud. Given the current budget constraints and the overload of cases presently pending under the jurisdiction of the Department of Justice, the Committee felt that some of these civil fraud cases could and should be resolved at the agency level.

The model for such an administrative remedy is the Civil Money Penalty (CMPL), which is available to the Department of Health and Human Services, for false claims for payment in the Medicare, Medicaid, and Maternal and Child Health Programs.

The Committee determined that there are a number of instances in which such an administrative remedy would be useful and through which false claims or false statements could be prosecuted without the expense of going to court in a civil action. However, the Committee was also concerned that the agencies not become overzealous in their prosecution of such claims. It has therefore incorporated numerous protections into the administrative remedy portion of the bill.

First, the agency may not hold a hearing, or even refer a case to a presiding officer for a hearing, without first providing the Department of Justice with the following information:

(1) a statement of the reasons for the referral;

(2) a statement specifying the evidence which supports the allegations;

(3) a description of the claims for which liability is alleged,

(4) an estimate of the amount of money or the value of property or services requested or demanded in violation of the Act; and

(5) a statement of any exculpatory or mitigating circumstances which may relate to such claims or statements.

This information is required so that the Department of Justice has enough information in order to determine whether it wishes to handle the case civilly or criminally or if it is an appropriate case for the agency, rather than the Department, to handle.

The Department of Justice has several alternatives available:

(1) The Department may determine that the claim should not be prosecuted in any forum;

(2) the Department can take the action and proceed in court;

(3) the Department can give permission for the agency to handle it; or

(4) the Department can take no action, in which case the agency can proceed with the case after 90 days.

Once the determination is made that the case will be handled pursuant to the administrative remedy, the conduct of the hearing and the procedures involved therein are subject to the provisions of the Administrative Procedure Act (APA). The Committee felt that the procedures outlined in the APA would serve as adequate protection to those being prosecuted by the agency. Thus, all hearings are to be conducted "on the record", which automatically activates 5 U.S.C. 554 et seq. Furthermore, all hearings are subject to judicial review in the District Courts under 5 U.S.C. 706 and will be determined under the substantial evidence test as provided for in the APA. The Committee has determined that the protections pro-

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vided under the APA are an absolute minimum for this type of case.

The Committee made an additional change to this section because it had the same concerns as in the civil actions section of the bill, that the administrative remedy would be used as a club to intimidate small businesses into not filing claims under the Contract Disputes Act. Therefore, provisions were included in this section which prevent the agency from holding an administrative hearing if a Contract Disputes Act claim has first been filed. This provision further states that a hearing shall be stayed if a Contract Disputes Act claim is filed, but only if the contractor did not know or should not have known of an investigation with respect to the matter, or if the initiation of a hearing before the claim was filed. However, no penalty is authorized under the administrative remedy for filing a Contract Disputes Act claim for the purpose of delaying a proceeding under the administrative remedy section of the bill. The Committee anticipates that most false claims adjudicated under the administrative remedy will be for smaller dollar fraud cases and felt that an additional penalty, especially when levied by the presiding officer, was unnecessary.

During consideration of this legislation, it was brought to the attention of the Committee that individuals receiving benefits under certain Government entitlement programs, such as social security, food stamps, and veterans benefits, could be disadvantaged by the implementation of the administrative remedy. The Committee was concerned that the agency involved may harass these individuals and use the administrative remedy as a club to intimidate these individuals into paying back the Government for money they did not realize they weren't entitled to; or into paying in one lump sum a figure that they could pay over a period of months and still maintain a basic level of sustenance.

The Committee noted that these individuals should not be held to the same degree of sophistication as those who voluntarily enter into contractual relationships with the Government for the purpose of making a profit.

Therefore, the Committee amended H.R. 4827 by providing safeguards for beneficiaries of Government entitlement programs. This amendment provides that persons who are receiving individual benefits of a Government entitlement program and who are defrauding the Government regarding that program can be prosecuted under the administrative remedy, only if the benefits received in violation of the Act exceed $15,000 and if the Government can prove that the individual has actual knowledge at the time of the violation that the conduct was false or fraudulent. The $15,000 limit shall be adjusted by the Attorney General, beginning in 1988, in accordance with the Consumer Price Index.

The amendment further provides that an individual, under this provision, who is financially unable to obtain counsel may petition the presiding officer for compensation to retain private counsel.

These provisions apply only to the administrative remedy section of the bill. The Government is not precluded from prosecuting an individual who is the beneficiary of a Government entitlement program under the civil action section of the Act.

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CRIMINAL PENALTIES

Section 8 of the bill raises the time of imprisonment for criminal violations involving false claims. This section amends section 287 of Title 18, United States Code, by raising the time of imprisonment from five years to ten years. This amendment makes the term of imprisonment in section 287 of Title 18, United States Code, consistent with section 286, Title 18, United States Code.

VI. SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

Section 1. This section provides that the short title for this bill will be the "False Claims Amendments Act of 1986".

SECTION 2. FALSE CLAIMS

Section 2(a). Liability for Certain Acts. This section is a complete rewrite of Section 3729 of title 31, United States Code. This section provides that the penalty and damages recoverable by the government for a violation of Section 3729, title 31, United States Code, will be not less than $5,000 and more more than $10,000, double damages and consequential damages. Consequential damages recoverable are singular.

This section further rewords certain sections of the Act (Section 3729(a) (4), (5), and (6)) so as to create a violation for defrauding the Federal government. The current language in the above sections are limited to use or control of property by members of the Armed Forces or for violations perpetrated against members of the Armed Forces.

Section 2(a) is also amended by creating a violation for a false claim to decrease an obligation to pay or transmit money or property to be paid to the Government.

Section 2(b). Calculation of Damages. This section defines consequential damages as damages which the United States would not have sustained but the violation of the Act; or entering or making a contract or grant as a result of any false statement.

This section provides that any credits to which the defendant may be entitled will not deducted from the amount payable until after the damages have been doubled.

This section further provides that if the court determines that any portion of the consequential damages sustained by the Government were reasonably unforeseeable by the defendant, the court may reduce the total amount of damages payable.

Section 2(c). Knowing and Knowingly Defined. This section defines "knowing" or "knowingly" as actual knowledge of the information; deliberate ignorance of the truth or falsity of the information; or reckless disregard for the truth or falsity of the information.

Section 2(d). Claim Defined. This section defines the term "claim" as a request or demand made for money or property from the government, whether under contract or not, if the Government is to provide any portion of the money or property demanded.

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SECTION 3. CIVIL ACTIONS FOR FALSE CLAIMS

Section 3(a). This section requires the Attorney General to investigate violations of Section 3729 and allows the Attorney General to bring a civil action against a person for a violation of Section 3729.

Section 3(b). This section is the "citizen suit" or *qui tam* provisions of the Act. Under this section, a person may bring a civil action for a violation of Section 3729 in the name of the United States.

The person must serve the Government with a copy of the complaint and substantially all material evidence and information the person possesses. The complaint filed by the person will be filed in camera and remain under seal for at least 60 days. Within 60 days of receiving the complaint and all material evidence and information, the Government may elect to intervene and proceed with the action.

The Government may, for good cause, move the court for extensions of the time during which the complaint remains under seal. The defendant is not required to answer the complaint until 20 days after the complaint is unsealed and served on the defendant.

After a sealed complaint is filed by a person, in the name of the United States, the government has two options:

(1) proceed with the action, in which case the government conducts the action; or

(2) decline to proceed with the action, in which case the person bringing the action has the right to conduct the action.

If the court finds that an action brought by a person is based on public information or information already available to the Government, the court shall dismiss the action unless the government proceeds with the action within 60 days. The court shall not dismiss such an action if the Government has been aware of the evidence or information for six months and has failed to file an action itself. The burden is on the defendant to prove the facts warranting dismissal of a case under these circumstances.

When an action is brought by a person, no person other than the Government may intervene or bring a related action.

Section 3(c). This section provides that if the Government elects to proceed with the action, the Government shall have the primary responsibility for prosecuting the action. The person bringing the action has the right to continue in the action as an intervenor of right. The Government is not bound by an act of the person bringing the action. The court may allow the Government to settle the action except that if the person bringing the action objects, the court must determine (after a hearing) that the proposed settlement is fair, adequate, and reasonable.

If the Government elects *not* to proceed with the action and the person who brought the suit conducts the action, the Government, upon request, is entitled to be served with copies of all pleadings and deposition transcripts (at the Government's expense). The court may permit the Government to intervene at a later date, upon a showing of good cause, but may not limit the rights and status of the person initiating the action.

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This section further provides that the court may stay discovery by the person bringing the action for 60 days upon a showing by the Government that such discovery would significantly interfere with the Government's prosecution of a criminal or civil matter arising out of the same facts. That 60 day period may be extended if the Government can show that the criminal investigation or civil proceeding has been pursued with reasonable diligence and that such discovery will interfere with the government proceedings. All such showings by the Government shall be conducted in camera.

Notwithstanding subsection (b) [which provides for the bringing of a civil action for a violation of Subsection 3729 by a person] the Government may elect to pursue its claim through any alternative remedies available to it. These alternative remedies may include, but are not limited to, any administrative proceedings to determine a civil money penalty. This section provides that if the Government pursues an administrative or alternative remedy, the person who initiates the action shall have the same rights as if the action were conducted in district court. This section further provides that if an alternate remedy is pursued, any findings of fact or conclusion of law made in such alternate remedy shall be conclusive on all parties to an action under this section. A finding or conclusion of law is defined as final if it has been finally determined on appeal to the appropriate court, if all time for filing an appeal has expired, of if the finding or conclusion is not subject to judicial review.

Section 3(d). This section provides the amount of payment the person bringing a *qui tam* action is entitled to receive. If the Government enters the action and if the person bringing the action disclosed relevant evidence or relevant information which the Government did not have at the time the action was brought, the person shall receive not less than 15% nor more than 25% of the proceeds of the action or settlement of the claim. The amount payable depends upon the extent to which the person substantially contributed to the prosecution of the action. If the person brings an action which was based on public information as contained in Section 3(b)(5), the person may only receive an amount to be determined by the court, taking into account the significance of the information provided and the role of the person in advancing the case, but not to exceed 10%. The person bringing the action is also entitled to receive reasonable expenses, attorneys fees, and costs to be awarded against the defendant in addition to the percentages awarded out of the proceeds.

If the government does *not* enter and proceed with the action, and if the person who brings the action proceeds with it to judgment or settlement, the person shall receive an amount which the court decides is reasonable. That amount shall not be less than 25% nor more than 30% of the proceeds of the action or settlement and is to be paid out of such proceeds. The person bringing the action is also entitled to receive reasonable expenses, attorneys fees, and costs, to be awarded against the defendant in addition to the percentage awarded out of the proceeds.

This section further provides that if the person proceeds with the action without the Government and the defendant prevails, the court may award reasonable attorneys fees and expenses to the de-

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fendant upon a finding that the action was clearly frivolous, vexatious, or brought solely for purposes of harassment.

Section 3(e). This section provides that the Government is not liable for any expenses incurred by a person in bringing an action under this section.

Section 3(f). This section provides that if a claim has been filed under the Contract Disputes Act, a civil action under this section may not be brought relating to the same matter that is the subject of the claim, nor can a civil investigative demand be issued with regard to such a claim. The statute of limitations for filing an action under this section is stayed until the Contract Disputes Act claim is finally resolved or, if appealed, a final decision on the merits has been issued.

This section also provides that if a suit was brought or a CID issued prior to the filing of a Contract Disputes Act claim, such suit or demand shall *not* be stayed if the contractor knew or should have known that an investigation with respect to the matter was being conducted, that a suit had been brought, or a CID initiated before the claim was filed.

If a court determines that a contractor intentionally and deliberately filed a claim under the Contract Disputes Act for the purpose of delaying or otherwise hindering an action under this section, the contractor is liable for a penalty of not less than $5,000 and not more than $100,000.

SECTION 4. ENTITLEMENT TO RELIEF FOR DISCRIMINATION BY EMPLOYERS AGAINST EMPLOYEES WHO REPORT VIOLATIONS

Section 4. This section is the whistleblower protection provision and provides that an employee, who is discriminated against because of his lawful participation in an action brought under this section, shall be entitled to all relief necessary to make the employee whole. Such relief includes: reinstatement with the same seniority status the person would have had but for the discrimination; double back pay with interest to be paid on the singular amount of back pay due; and compensation for special damages, including litigation costs and reasonable attorneys fees. An employee may bring an action for relief under this subsection in the appropriate district court of the United States.

SECTION 5. FALSE CLAIMS PROCEDURES

Section 5. This section provides a dual statute of limitations. The statute of limitations is to be not more than six years after the date of the occurrence of the violation; or not more than 3 years after the date when the material facts of the violation are known or should have been known by the official of the United States with responsibility to act, but no action is to be brought more than 10 years after the date of the occurrence of the violation.

This section further requires the United States to prove the essential elements of the cause of action, including damages, by a preponderance of the evidence.

This section also provides that in cases arising under this Act, a plea of *nolo contendere* in a criminal proceeding which charges fraud of false statements, will have the same effect as a guilty plea

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and will thereby estop the defendant from denying the essential elements in a civil action brought pursuant to this Act if it involves the same transaction as in the criminal proceeding.

SECTION 6. FALSE CLAIMS JURISDICTION; CIVIL INVESTIGATIVE DEMANDS

Section 6. This section of the bill adds two new sections to the civil False Claims Act.

Section 3732. False Claims Jurisdiction

This section provides that jurisdiction for an action brought pursuant to this Act will be brought in the judicial district where any defendant can be found, resides, transacts business, or in which any act alleged as a violation is alleged to have occurred. Summons are to be issued by the appropriate district court, pursuant to the Federal Rules of Civil Procedure and are to be served at any place within or outside the United States.

This section further provides the district court with jurisdiction to adjudicate state law claims for the recovery of funds paid by a state or local government if the state action arises from the same transaction or occurrence as the federal false claims violation.

Section 3733. Civil Investigative Demands

This section provides the false claims law investigator within the Department of Justice with the authority to conduct discovery prior to initiating a civil action under the False Claims Act. The issuance of such civil investigative demands requires that the Attorney General *only* authorize such, in writing. This authority is not delegable. The section outlines the procedures and guidelines relative to materials which are the subject of discovery under this section and provide safeguards for the person from whom such discovery is sought. This section is patterned after and similar to those provisions available to the Department of Justice relative to Anti-Trust investigations and which were authorized in the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, 15 U.S.C. 1311–1314.

SECTION 7. ADMINISTRATIVE REMEDY

This section provides an administrative remedy for violations of the civil False Claims Act (title 31, section 3729, United States Code) and for false statements which assert a material fact which is false or fraudulent or omits a material fact if such omission makes the statement false or fraudulent or if the person has a duty to include such material fact. The section also sets forth the procedures under which the administrative remedy may be used.

Pursuant to this section, an investigating official may investigate allegations that a person has violated Section 3729 or has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement (as defined in this section, and shall, unless the allegations are determined to be without merit, report the results of the investigation to the reviewing official.

The reviewing official may refer allegations of a violation to a presiding officer if the Attorney General approves the referral of

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such allegations; or takes no action to disapprove the referral within 90 days or within such period as may be provided pursuant to a memorandum of understanding between the agency head and the Attorney General. The reviewing official must provide the Department of Justice with (1) a statement of the reasons of the reviewing official for the referral of such allegations; (2) a statement specifying the evidence which supports such allegations; (3) a description of the claims for which liability under section 3729 is alleged; (4) an estimate of the amount of money or the value of property or services requested or demanded in violations of Section 3729; and (5) a statement of any exculpatory or mitigating circumstances which may relate to such claims or statements.

If an administrative hearing is begun, the Attorney General may transmit a written finding to the agency head stating that continuation of a hearing may adversely affect any pending or potential criminal or civil action, whereupon the hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.

The reviewing official shall give notice of any hearing to the person and shall prosecute the case on behalf of the agency.

Any hearing conducted pursuant to this section shall be on the record and governed by the provisions of subchapter II of chapter 5 of title 5, United States Code (the Administrative Procedure Act).

The presiding officer is authorized to determine whether the person committed the violation and the amount of any penalty or damages to be imposed. Any such determination shall be based on a preponderance of the evidence.

If a claim has been filed under the provisions of the Contract Disputes Act, a hearing under this section may not be conducted if the hearing relates to the same matter that is the subject of the Contract Disputes Act claim. The statute of limitations is stayed during this period until such time as the claim is finally resolved, or, if appealed, there has been a final decision on the merits.

If a claim under the Contract Disputes Act is filed after a hearing under this section has been initiated, the hearing shall not be stayed if the contractor knew or should have known of an investigation with respect to the matter, or of the initiation of a hearing before filing the Contract Disputes claim.

This section provides the investigating official with documentary subpoena power. The presiding officer is provided with testimonial and documentary subpoena power as he determines to be relevant and material to the hearing. Subpoenas may be enforced according to the provisions of the Administrative Procedure Act.

This section provides that an individual alleged to have violated the civil False Claims Act or made or caused to be made a fraudulent statement with respect to benefits received by that individual, may be determined to be liable only if, at the time of the conduct constituting the violation, that individual had actual knowledge that the conduct was false or fraudulent.

Allegations of liability by such a person receiving benefits may not be referred to a presiding officer unless the reviewing official determines that the dollar amount of benefits received in violation of this Act exceeds $15,000. (The $15,000 limit shall be adjusted by

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the Attorney General in accordance with the Consumer Price Index beginning in 1988.)

The section defines "benefits" by listing a number of federal entitlement programs, and in general, describing "benefits under any other Federal program which has a similar purpose to those programs described (in the list) of providing for income, health, nutrition, or social services needs which are intended for the personal use of the individual or a member of the individual's family." The Attorney General, after notice and an opportunity for the submission of public comments, is to publish a list of the programs.

The section further provides that any person whose conduct is the subject of a hearing under this section and who is financially unable to obtain counsel may petition the presiding officer for compensation of private counsel. Such compensation shall be awarded in accordance with the financial eligibility standards and the payment rates established under section 3006A of title 18 for persons financially unable to obtain adequate representation. Such compensation shall be paid from any funds available to the agency involved for such purpose.

This section provides for judicial review in the United States district court for the district in which the person resides or in which the violation occurred, or in the United States District Court for the District of Columbia.

This section provides procedures for the collection of Civil Penalties which may be imposed under the section.

The statute of limitations for a finding of liability under this section is the same as the statute of limitations under the civil false claims law.

The statute of limitations on actions to recover civil penalties is not more than three years after the date on which the determination of liability for such penalty or damages becomes final.

Each agency head is directed to issue such regulations as are necessary to implement the provisions of this section.

This section further authorizes the United States to setoff the amount of penalty or damages which has become final or for which a judgment has been entered, or any amount agreed upon in a settlement from any sum then or later owing by the United States to the person liable for such penalty. This right to setoff is not authorized if otherwise prohibited by law or if the Federal government has agreed by contract not to exercise its right of setoff. Before any such setoff is exercised, the agency head shall transmit written notice to the person affected.

Any penalties collected pursuant to this section shall be deposited in the miscellaneous receipts of the United States Treasury, except those penalties collected by the United States Postal Service which shall be deposited in the Postal Service Fund. An agency head may forward a certified copy of any determination as to liability for any penalty which has become final or of any judgment that has been entered to the Secretary of the Treasury.

This section defines "agency" in accordance with the definition in the Administrative Procedure Act.

"Agency head" is defined as the head of an agency, or an officer or employee designated by the head of the agency to act as such;

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except that, in the case of a military department, agency head means the Secretary of Defense.

"Investigating official" is defined as the Inspector General of an agency, if the agency has an Office of the Inspector General as established by the Inspector General Act of 1978 or other Federal law. If an Office of Inspector General has not been established for an agency, the investigating official will be any officer or employee of the agency designated by the agency head to conduct investigations under this section. In the case of a military department, the investigating official shall be the Inspector General of the Department of Defense or an officer or employee within the military department designated by the Inspector General.

"Reviewing official" is defined as any officer or employee of an agency who is designated by the agency head and who, if an active duty member of the Armed Forces, is a grade O–7 or above or, if a civilian is not less than a GS–16. The reviewing official may not be subject to supervision by or required to report to the investigating official and may not be employed in the organizational unit of the agency in which the investigating official is employed.

The "presiding officer" is defined as being an Administrative Law Judge or the equivalent of such in compensation, selection, and functions.

SECTION 8. CRIMINAL PENALTIES

This section amends Section 287 of title 31, United States Code by raising the time of imprisonment to ten years for making or presenting a false, fictitious, or fraudulent claim upon or against the United States.

SECTION 9. EFFECTIVE DATE

The effective date of this Act shall be the date of enactment of this Act, except that section 7, the administrative remedy, shall take effect 180 days after the date of enactment of this Act. Within Section 7, Section 3734(h) of title 31 United States Code, which authorizes the agency head to issue regulations necessary to implement this section, shall become effective on the date of enactment of this Act.

RECOMMENDATION

COMMITTEE VOTE

(Rule XI, clause 2(l)(2)(B))

On June 10, 1986, a reporting quorum being present, the Committee on the Judiciary favorably reported by unanimous roll call vote (35–0) H.R. 4827 with a single amendment in the nature of a substitute.

OVERSIGHT STATEMENT

(Rule XI, clause 2(l)(3)(A))

The Committee on the Judiciary exercises its oversight responsibilities with reference to ethics and criminal laws. The Committee

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has determined that H.R. 4827 should be favorably reported as amended.

BUDGET STATEMENT

(Rule XI, clause 2(l)(3)(B))

The sections of H.R. 4827 within the jurisdiction of the Judiciary Committee do not directly provide budget authority nor do they involve new or increased tax expenditures contemplated by clause 2(l)(3)(B) of Rule XI.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI, clause 2(l)(3)(D))

No findings or recommendations of the Committee on Government Operations were received on H.R. 4827 as referred to in clause 2(l)(3)(D) of Rule XI.

INFLATIONARY IMPACT

(Rule XI, clause 2(l)(4))

In compliance with clause 2(l)(4) of Rule XI, it is stated that the committee recommendations will have no inflationary impact on prices and costs in the operation of the national economy.

COSTS

(Rule XIII, clause 7(a)(1))

The costs are those outlined in the cost estimate of the Congressional Budget Office included in this report.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 25, 1986.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 4827, a bill to amend Title 31, United States Code, with respect to the fraudulent use of public property or money, as ordered reported by the House Committee on the Judiciary, June 10, 1986. This estimate supersedes our cost estimate of June 20, 1986.

H.R. 4827 would increase the penalties to which defendants are liable under the False Claims Act, broaden the scope of liability under the act, give the Department of Justice the authority to issue investigative demands prior to filing a complaint, and make a number of procedural changes for the conduct of false claims suits. The bill would also create an administrative remedy for False Claims Act violations. These amendments are expected to involve no significant costs, to the federal government and no cost to state or local governments. CBO expects the federal government would

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receive additional revenues from civil penalties and damages as a result of this bill, though judgments may be delayed in some cases. The net budgetary impact cannot be estimated with precision.

Section 7 of this bill would establish procedures by which agency heads may impose civil penalties and damages on persons violating the false claims act or knowingly making false statements. Persons charged with such violations would be entitled to a hearing conducted by an administrative law judge. An agency head could impose penalties under the False Claims Act for violations of that act and maximum penalties of $10,000 for other violations involving false or fraudulent statements. The bill gives the U.S. Attorney General responsibility for enforcement of penalties, and all collections would be deposited in the general fund of the Treasury. Judicial review could be obtained in the U.S. district courts.

We expect that the federal government would receive additional revenues from civil penalties and damages imposed as a result of the enactment of this bill. In 1981, the General Accounting Office published a comprehensive study of fraud in government programs (*Fraud in Government Programs: How Extensive Is It? How Can It be Controlled?*, AFMD-81-73). Based on that study, it appears that 10,000-15,000 cases of fraud involving amounts of $100,000 or less, with known participants, are identified annually. Such cases were estimated to cost the government $30 million to $40 million a year. There is no clear basis for projecting the number or the amount of fines that would be levied as a direct result of enactment of this provision. As an example, however, if an average fine of $50,000 were levied for 150 cases per year, additional revenues would total $7.5 million annually. These revenues would be offset somewhat by the additional administrative, judicial, and enforcement costs incurred by the various agencies to implement the bill.

Administrative proceedings authorized by this bill could not be brought against beneficiaries of certain federal programs unless these individuals had actual knowledge that their conduct was false or fraudulent, and the amount of benefits involved exceeds $15,000. H.R. 4827 also provides that persons unable to afford counsel for such proceedings shall receive compensation for private counsel. Compensation shall be paid from any funds made available to the agency involved for such purpose. Based on information from the Departments of Defense and Health and Human Services, we expect that the amount of such compensation paid will not be great. We cannot predict, however, the exact cost of this requirement or its effect on agencies' utilization of this administrative remedy.

H.R. 4827 also provides that neither judicial nor administrative false claims actions may be brought as long as a claim in pending under Section 6 of the Contract Disputes Act. This provision could delay some false claims actions for several years during contract disputes litigation. Thus, some revenues to the government that would result from penalties or damages in such cases might be delayed. We are unable, however, to accurately estimates the impact of this change.

Increased costs for litigation would offset some of the increased revenues produced by this bill, if it results in an increased number of false claims actions, particularly those brought by individuals.

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If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 31, UNITED STATES CODE

* * * * * * *

Subtitle III—Financial Management

* * * * * * *

CHAPTER 37—CLAIMS

* * * * * * *

SUBCHAPTER III—CLAIMS AGAINST THE UNITED STATES GOVERNMENT

3721. Claims of personnel of agencies and the District of Columbia government for personal property damage or loss.

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3732. False claims jurisdiction.
3733. Civil investigative demands.
3734. Administrative remedy.

* * * * * * *

§ 3729. False claims

[A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person—]

(a) *LIABILITY FOR CERTAIN ACTS.—Any person who—*

(1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval;

* * * * * * *

(4) has possession, custody, or control of [public] property or money used, or to be used, [in an armed force] *by the United States Government* and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

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(5) authorized to make or deliver a document certifying receipt of property used, or to be used, [in an armed force] *by the United States Government* and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; [or]

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from [a member of an armed force] *an officer or employee of the Government, or a member of the armed forces,* who lawfully may not sell or pledge the property]; *or*

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government;

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, for an amount equal to consequential damages as set forth in subsection (b)(1) plus 2 times the amount of damages (other than such consequential damages) which the Government sustains because of the act of that person, and for the costs of a civil action brought to recover any such penalty or damages.

(b) CALCULATION OF DAMAGES.—(1) For purposes of this section, consequential damages include damages which the United States would not have sustained but for—

(A) the commission of any of the acts prohibited by subsection (a); or

(B) entering into or making any contract or grant as a result, in any material part, of any false statement, record, or claim.

(2) Any credits to which the defendant establishes entitlement may be deducted from the amount payable under subsection (a) only after the damages sustained by the United States have been doubled as set forth in subsection (a).

(3) If any portion of the damages sustained by the United States under paragraph (1) is considered reasonably unforeseeable by the court, the court may reduce the total amount of damages payable under paragraph (1).

(c) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information.

(d) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

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[§ 3730. Civil actions for false claims

[(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person. The person may be arrested and bail set for an amount of not more than $2,000 and 2 times the amount of damages sworn to in an affidavit of the Attorney General.

[(b)(1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. The district courts of the United States have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

[(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.). The Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government—

[(A) by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter, the action; or

[(B) does not proceed with the action with reasonable diligence within 6 months after entering an appearance, or within additional time the court allows after notice.

[(3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

[(4) Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

[(c)(1) If the Government proceeds with an action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

[(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount may not be more than 25 percent of the proceeds of the action or settlement and shall be paid out of those proceeds. The person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

[(d) The Government is not liable for expenses a person incurs in bringing an action under this section.]

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§ 3730. Civil actions for false claims

(a) The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b)(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. Subject to paragraph (5), an action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Subject to paragraph (5), before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5)(A) If the court finds that an action brought by a person under this subsection—

(i) is based on specific evidence or specific information which the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or

(ii) is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media,

the court shall dismiss the action, unless subparagraph (B) applies.

(B) The court shall not dismiss an action under subparagraph (A)—

(i) if the Government proceeds with the action before the expiration of the 60-day period described in paragraph (2) or any extensions obtained under paragraph (3); or

(ii) if the Government was aware of the evidence or information described in subparagraph (A) or (B) for a period of at least 6 months before the person initiated the action, and the Govern-

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ment did not initiate a civil action on the matter involved within that 6-month period, or within such additional times as the court allows upon a showing of good cause.

(C) The defendant must prove the facts warranting dismissal of a case to which this paragraph applies.

(6) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c)(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action. The person bringing the action shall have a right to continue in the action with the same rights as provided by Rule 24(a) of the Federal Rules of Civil Procedure. The Government is not bound by an act of the person bringing the action.

(2) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines after a hearing, including the opportunity for presentation of evidence, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

(3) Upon a showing of the Government that certain actions of discovery by the person initiating the action would significantly interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The Court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(4) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

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(d)(1) If the Government proceeds with an action under this section, and the person bringing the action discloses relevant evidence, or relevant information, which the Government did not have at the time the action was brought, such person shall receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds, under subsection (b)(5), to be based solely on evidence or information described in subparagraph (A) or (B) of that subsection, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the evidence or information and the role of a person in advancing the case to litigation. Any payment under this paragraph shall be made from the proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, vexatious, or brought solely for purposes of harassment.

(e) The Government is not liable for expenses which a person incurs in bringing an action under this section.

(f)(1) If a claim has been filed under section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 601 and following), an action may not be brought under this section if that action is based on the same matter that is the subject of the claim, and a civil investigative demand may not be issued under section 3733 with regard to such claim. The prohibition of the preceding sentence shall be in effect until such time as the claim is finally resolved or, if an appeal is taken under section 7 or section 10 of the Contract Disputes Act of 1978, there has been a final decision on the merits. The running of the time allowed in section 3731(b) for bringing an action under this section shall be stayed during the period in which the prohibition in the first sentence of this paragraph is in effect.

(2) If a suit was brought or such a demand was initiated before the contractor filed a claim under section 6 of the Contract Disputes Act of 1978, such suit or demand shall not be stayed, but only if the contractor knew or should have known of an investigation with respect to the matter, of the bringing of such suit, or of the initiation of such demand, before filing the claim under section 6 of such Act.

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(3) In any action under this section, if the court determines that a contractor has intentionally and deliberately filed a claim under section 6 of the Contract Disputes Act of 1978 for the purpose of delaying or otherwise hindering an action under this section, the contractor is liable for a penalty of not less than $5,000 and not more than $100,000..

(g) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer in whole or in part because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection..

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

[(b) A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed.]

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant, or

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in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

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(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced; and

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

Any such demand which is an express demand for any product of discovery shall not be returned or returnable until 20 days after the date on which a copy of such demand has been served upon the person from whom the discovery was obtained.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal

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Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

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The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the

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examination is held all persons except the person being examined, the person's counsel, the officer before whom the testimony is to be taken, and any other stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness's testimony.

(7) CONDUCT OF ORAL TESTIMONY.—(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege,

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including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—(A) The false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent

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disclosure to the Congress, including any committee or subcommittee of the Congress.

(D) Notwithstanding subparagraph (C), documentary material, answers to interrogatories, or transcripts of oral testimony obtained under a civil investigative demand issued under this section shall be disclosed to an agency of the United States if—

(i) that agency files, in a district court of the United States in which petitions under subsection (j) may be filed, and serves upon the person named in the civil investigative demand and, in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, a petition requesting such disclosure;

(ii) any person so served has an opportunity to be heard on the petition;

(iii) the court finds that disclosure of the information involved is relevant to an investigation by the agency which it is authorized by law to conduct; and

(iv) the court issues an order requiring such disclosure.

The provisions of paragraphs (5) and (6) of subsection (j) (relating to jurisdiction and applicability of the Federal Rules of Civil Procedure) apply to petitions under this subparagraph.

(E) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before

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any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made by the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such

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demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from

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whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(7) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(k) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732, and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

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(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

§ 3734. Administrative determination of liability for false claims and false statements

(a) IN GENERAL.—An agency head may impose upon any person who violates section 3729 the penalties and damages set forth in that section, in accordance with the procedures set forth in this section. In addition, an agency head, in accordance with the procedures set forth in this section, may impose upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, with respect to any matter within the jurisdiction of that agency, a statement that the person knows or has reason to know—

(1) asserts a material fact which is false or fraudulent; or

(2) omits a material fact if—

(A) as a result of such omission, such statement is false or fraudulent, and

(B) the person making, presenting, or submitting such statement has a duty to include such material fact in the statement,

a civil penalty of not more than $10,000 for each such statement, in addition to any other remedy that may be prescribed by law.

(b) DETERMINATIONS OF LIABILITY.—

(1) INVESTIGATION.—The investigating official of an agency may investigate allegations that a person has violated section 3729 or has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), and shall (unless the allegations are determined to be without merit) report the results of such investigation to the reviewing official of the agency. Nothing in this subsection alters any responsibilities under section 4(d) of the Inspector General Act of 1978 of an investigating official to report expeditiously any criminal violations to the Attorney General.

(2) REFERRAL TO PRESIDING OFFICER.—(A) If the reviewing official of an agency determines that there is adequate evidence to believe that a person has violated section 3729 or has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), the reviewing official shall, in accordance with subparagraphs (B) through (F), refer the allegations of such violation to a presiding officer of the agency for a hearing.

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(B) Before referring allegations of a violation to a presiding officer under subparagraph (A), the reviewing official of an agency shall transmit to the Attorney General a written notice of the intention of such official to refer such allegations and a statement of the reasons for such intention. Such notice shall include—

(i) a statement of the reasons of the reviewing official for the referral of such allegations;

(ii) a statement specifying the evidence which supports such allegations;

(iii) a description of the claim, record, statement, or other act for which liability under section 3729 or subsection (a) is alleged;

(iv) an estimate of the amount of money or the value of property or services requested or demanded in violation of section 3729; and

(v) a statement of any exculpatory or mitigating circumstances which may relate to the claim, record, statement, or other act involved in the alleged violation.

(C) A reviewing official may refer allegations of a violation to a presiding officer if—

(i) the Attorney General approves the referral of such allegations; or

(ii) the Attorney General takes no action to disapprove the referral of such allegations—

(I) within 90 days after the date on which the Attorney General receives the notice required by subparagraph (B); or

(II) within such period as may be provided in a memorandum of understanding entered into by the agency head involved and the Attorney General with respect to such allegations.

(D) A reviewing official may not refer allegations to a presiding officer under this paragraph if the Attorney General transmits a written statement to the reviewing official which specifies that the Attorney General disapproves the referral of the allegations and states the reasons for such disapproval.

(E) If the Attorney General transmits to an agency head a written finding that the continuation of any hearing under subsection (c) may adversely affect any pending or potential criminal or civil action related to an alleged violation of section 3729 or of section 1001 of title 18, the hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.

(c) HEARINGS.—

(1) NOTICE OF HEARING.—A reviewing official who refers under subsection (b) allegations of a violation by a person of section 3729, or allegations that a person has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), shall give notice to the person, in accordance with section 554(b) of title 5, of the hearing to be conducted with respect to those allegations. The reviewing official shall prosecute the case on behalf of the agency.

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(2) CONDUCT OF HEARING.—The presiding officer shall conduct a hearing on the record regarding any allegation of a violation by a person of section 3729, or any allegation that a person has made, presented, or submitted, or has caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), which is referred to the presiding officer by the reviewing official under subsection (b) in order to determine—

(A) whether the person committed the violation; and

(B) the amount of any penalty or damages to be assessed against such person.

Any such determination shall be based on a preponderance of the evidence.

(3) APPLICABILITY OF TITLE 5 PROCEDURES.—The provisions of subchapter II of chapter 5 of title 5 shall apply to each hearing conducted under paragraph (2).

(4) RESOLUTION UNDER CONTRACT DISPUTES ACT.—

(A) If a claim has been filed under section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 601 and following), a hearing with respect to the same matter that is the subject of the claim may not be conducted under this section. The prohibition of the preceding sentence shall be in effect until such time as the claim is finally resolved or, if an appeal is taken under section 7 or section 10 of the Contract Disputes Act of 1978, there has been a final decision on the merits. The running of the time limitations in subsection (h) shall be stayed during the period in which the prohibition in the first sentence of this paragraph is in effect.

(B) If a hearing under this section was initiated before a claim was filed under section 6 of the Contract Disputes Act of 1978, the hearing shall not be stayed, but only if the contractor knew or should have known of an investigation with respect to the matter, or of the initiation of the hearing, before filing a claim under section 6 of such Act.

(d) SUBPOENA AUTHORITY.—

(1) OF INVESTIGATING OFFICIALS.—For the purpose of an investigation under subsection (b)(1), an investigating official is authorized to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data not otherwise reasonably available to the agency involved.

(2) OF PRESIDING OFFICERS.—For the purpose of conducting a hearing under subsection (c)(2), a presiding officer is authorized to require by subpoena the attendance and testimony of witnesses and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the presiding officer considers relevant and material to the hearing.

(3) ENFORCEMENT OF SUBPOENAS.—The provisions of section 555(d) of title 5 shall apply to any subpoena issued under this subsection.

(e) PROCEEDINGS AGAINST BENEFICIARIES OF FEDERAL PROGRAMS.—

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(1) REQUIREMENT FOR DETERMINATION OF VIOLATION.—An individual may be determined under this section to have violated section 3729, or to have made, presented, or submitted, or caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a), with respect to benefits received by that individual only if that individual, at the time of the conduct constituting the violation, had actual knowledge that the conduct was false or fraudulent.

(2) AMOUNT OF MONEY IN VIOLATION.—Allegations of liability under section 3729 by an individual, or of a false or fraudulent statement made, presented, or submitted, or caused to be made, presented, or submitted, by an individual, with respect to benefits received by that individual may not be referred to a presiding officer under subsection (b)(2) unless the reviewing official determines that the dollar amount of benefits received in violation of section 3729 or as a result of the false or fraudulent statement exceeds $15,000. In 1988 and annually thereafter, the $15,000 limit in the preceding sentence shall be adjusted by the Attorney General in accordance with the Consumer Price Index.

(3) ATTORNEY FEES.—Any individual whose conduct is the subject of a hearing under this section with respect to benefits received by that individual, who is financially unable to obtain adequate representation, and who is otherwise unable to obtain counsel may petition the presiding officer for compensation of private counsel retained by that individual. The presiding officer shall award such compensation in accordance with the financial eligibility standards and the payment rates established under section 3006A of title 18 for persons financially unable to obtain adequate representation. Such compensation shall be paid from any funds made available to the agency involved.

(4) DEFINITION.—For purposes of this subsection, the term "benefits" means—

(A) benefits under the supplemental security income program under title XVI of the Social Security Act;

(B) old age, survivors, and disability insurance benefits under title II of the Social Security Act;

(C) benefits under title XVIII of the Social Security Act;

(D) aid to families with dependent children under a State plan approved under section 402(a) of the Social Security Act;

(E) medical assistance under a State plan approved under section 1902(a) of the Social Security Act;

(F) benefits under title XX of the Social Security Act;

(G) benefits under the food stamp program as defined in section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. 2412(h));

(H) benefits under laws administered by the Veteran's Administration;

(I) benefits under the Black Lung Benefits Act;

(J) benefits under the special supplemental food program for women, infants, and children under section 17 of the Child Nutrition Act of 1966;

(K) benefits under section 336 of the Older Americans Act;

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(L) any annuity or other benefit under the Railroad Retirement Act of 1974;

(M) benefits under subchapter III of chapter 83 of title 5; and

(N) benefits under any other Federal program which has a purpose similar to those programs described in subparagraphs (A) through (M) of providing for income, health, nutrition, or social services needs,

which are intended for the personal use of the individual who receives the benefits or of a member of the individual's family. The Attorney General shall, after notice and an opportunity for the submission of public comments, publish a list of those programs described in subparagraph (N).

(f) JUDICIAL REVIEW.—Any person who is determined under this section to have violated section 3729 or to have made, presented, or submitted, or to have caused to be made, presented, or submitted, a false or fraudulent statement described in subsection (a) may obtain review of that determination in the United States district court for the district in which the person resides or in which the violation occurred, or in the United States District Court for the District of Columbia. The provisions of chapter 7 of title 5 shall apply to such review.

(g) COLLECTION OF CIVIL PENALTIES.—

(1) CIVIL ACTION FOR RECOVERY.—Any penalty or damages assessed in a determination under this section which has become final may be recovered in a civil action brought by the Attorney General in the appropriate district court of the United States. In any such action, any matter that was raised or that could have been raised in a hearing conducted under subsection (c) or pursuant to judicial review under subsection (f) may not be raised as a defense, and the determination of a violation and the determination of amounts of penalties or damages shall not be subject to review.

(2) CONSOLIDATION OF ACTIONS.—Any action under paragraph (1) may, without regard to venue requirements, be joined and consolidated with, or asserted as a counterclaim, cross-claim, or setoff by the United States in, any other civil action which includes as parties the United States and the person against whom the action under paragraph (1) is brought.

(3) COMPROMISE AUTHORITY.—The Attorney General shall have exclusive authority to compromise or settle any penalty or damages the determination of which is the subject of a pending appeal under subsection (f) or a pending action to recover such penalty or damages under this subsection.

(4) DEPOSIT OF PENALTIES COLLECTED.—Any amount of penalty or damages collected under this section shall be deposited in the miscellaneous receipts of the Treasury of the United States, except that any such amount collected by the United States Postal Service shall be deposited in the Postal Service Fund established by section 2003 of title 39.

(h) LIMITATIONS.—

(1) ON LIABILITY.—A person shall not be subject to any penalty or damages under this section—

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(A) more than 6 years after the date on which the acts of that person referred to in subsection (a) occur, or

(B) more than 3 years after the date when facts material to warrant proceedings under this section against that person are known or reasonably should have been known by the official within the agency charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the acts of that person referred to in subsection (a) occur,

whichever occurs last.

(2) ON ACTIONS TO RECOVER PENALTIES.—A civil action to recover a penalty or damages under subsection (g) may not be brought more than 3 years after the date on which the determination of liability for such penalty or damages becomes final.

(3) REPORTING OF ADDITIONAL INFORMATION.—If at any time during the course of proceedings brought under this section the agency head involved receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim, statement, or record or other activity prohibited by section 3729, or in relation to a statement described in subsection (a), the agency head shall immediately report such information to the Attorney General, and in the case of an agency in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, to the Inspector General of that agency.

(i) REGULATIONS.—Each agency head shall issue such regulations as are necessary to implement the provisions of this section.

(j) RIGHT TO SETOFF.—

(1) IN GENERAL.—The amount of any penalty or damages the determination of which has become final under this section, or for which a judgment has been entered under subsection (f) or (g), or any amount agreed upon in a settlement or compromise under subsection (g)(3), may be deducted from any sum then or later owing by the United States to the person liable for such penalty or damages, unless otherwise prohibited by law and except in a case in which the Federal Government has agreed by contract not to exercise any rights of setoff the Government has.

(2) NOTICE.—The agency head involved shall transmit written notice to the person liable for such penalty or damages before commencing a deduction or series of deductions under this subsection.

(3) DEPOSIT OF AMOUNTS.—All amounts retained under this subsection shall be remitted to the Secretary of the Treasury for deposits in accordance with subsection (g)(4).

(4) NOTIFICATION OF THE SECRETARY OF THE TREASURY.—An agency head may forward a certified copy of any determination as to liability for any penalty or damages which has become final under this section, or a certified copy of any judgment which has been entered under subsection (f) or (g), to the Secretary of the Treasury for action in accordance with this subsection.

(k) DEFINITIONS.—For purposes of this section—

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(1) the term "agency" means an agency as defined in section 551 of title 5;

(2) the term "agency head" means—

(A) the head of an agency, or

(B) an officer or employee of the agency designated, in regulations promulgated by the head of the agency, to act on behalf of the head of the agency;

except that, in the case of a military department, "agency head" means the Secretary of Defense;

(3) the term "investigating official" means—

(A) in the case of an agency in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, the Inspector General of that agency;

(B) in the case of a military department, the Inspector General of the Department of Defense or an officer or employee within the military department designated by the Inspector General;

(C) in the case of any other agency, any officer or employee of the agency designated by the agency head to conduct investigations under subsection (b)(1) of this section; and

(4) the term "reviewing official" means any officer or employee of an agency—

(A) who is designated by the agency head to make determinations required by subsection (b)(2)(A) of this section;

(B) who, if a member of the Armed Forces of the United States on active duty, is serving in a pay grade of O–7 or higher or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay payable for grade GS–16 of the General Schedule; and

(C) who—

(i) is not subject to supervision by, or required to report to, the investigating official; and

(ii) is not employed in the organizational unit of the agency in which the investigating official is employed; and

(5) the term "presiding officer" means—

(A) an administrative law judge appointed under section 3105 of title 5; or

(B) if such an administrative law judge is not available to an agency, an official designated by the agency head who performs functions comparable to and in a similar manner as administrative law judges appointed under section 3105 of title 5, and is selected, compensated, and otherwise treated in a similar manner as such administrative law judges.

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SECTION 287 OF TITLE 18, UNITED STATES CODE

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than [five] *ten* years, or both.

* * * * * * *

[The following letter was received from John R. Bolton, Assistant Attorney General, United States Department of Justice.]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, May 19, 1986.

Congressman PETER RODINO,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Department of Justice strongly supports the thrust of H.R. 4827, Congressman Glickman's amendments to the False Claims Act, with the exceptions noted below and we urge the Committee to act promptly to report the bill amended as we suggest.

The civil fraud remedies contained in the False Claims Act are an essential element in our efforts to prevent fraud in connection with federal programs. In addition to criminal prosecution, the aggressive use of our civil remedies is a significant deterrent as well as an aid to making the government whole for losses to fraudulent claims.

The amendments contained in H.R. 4827 would modernize and clarify the provisions of this 123-year old statute, as well as grant the government new investigative powers and additional legal remedies. It is important to note that, as a civil remedy, the False Claims Act should not be burdened with the functional equivalent of criminal standards of proof and scienter. Therefore, we urge the Committee to reject amendments which would impose a "clear and convincing" burden of proof and an "intent" standard of knowledge in these civil proceedings.

In addition to updating the core provisions of the Act, the bill also grants much needed new investigative powers to the Department of Justice. The expansion of the Civil Investigative Demand (CID) powers, currently available to the Antitrust Division to investigations of civil fraud cases, is especially critical for the effective prosecution of complex cases. Yet this is not an unfettered power; all the protections applicable to similar investigative powers would apply here. A senior Department official would have to approve the use of the authority and all defenses available in any subpoena action could be asserted by the recipient of a CID. In addition, where the response to a CID indicates illegal conduct affecting the statutory responsibilities of other federal agencies, the bill should be amended to permit the Justice Department to share the information it obtains with those agencies.

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The Department continues to strongly oppose significant changes in the *qui tam* or citizen suit provisions of the False Claims Act. The amendments to expand this right of citizen action present serious problems given the history of misuse of the existing statute to bring frivolous, politically-motivated lawsuits. In recent years, defendants in *qui tam* suits have included officials as diverse as President Carter, President Ford, former Senator Howard Cannon, Chicago Mayor Richard Daley and the Board of Governors of the Federal Reserve. However, *qui tam* suits have rarely brought to light significant evidence about fraud against the government.

Of particular concern is Congressman Berman's amendment, which would permit the *qui tam* plaintiff to continue to participate in the litigation even after the Justice Department has stepped in and is proceeding with the suit. There is no justification for allowing a private litigant to continue to pursue the exact same claim that is already being prosecuted by attorneys for the Government. Nor is there any evidence that the Department has not been aggressive in pursuing civil fraud cases.

In view of the serious potential for the misues of the statute and the sweeping rights available to a private plaintiff under the Federal Rules of Civil Procedure, we strongly object to this provision. Such a proposal would allow a private plaintiff to subpoena documents and compel testimony (including information known only to the government which the defendant may not have requested or thought relevant), and introduces a major disruptive element into the careful and tactically difficult job of proving a complex fraud case. The result would be an unnecessary burden to the courts and to the United States, without providing any assistance to the government in its prosecution of fraud cases.

At a minimum, the Committee should modify the bill to make the *qui tam* plaintiff's right to intervene in the action permissive, thus giving the courts discretion to limit intervention in appropriate cases, rather than automatic and as of right. Such an amendment would permit the government to object to intervention when it appeared that a person was attempting to misuse the statute for improper purposes. In addition, amending the bill to include a stricter standard for the award of attorney fees against individuals who bring frivolous *qui tam* suits—such as the "substantially justified" standard contained in the Equal Access to Justice Act—would also help deter frivolous suits.

Finally, the Department strongly opposes the subcommittee's action in prohibiting use of the new administrative remedies provision of the bill to prosecute fraud in fifteen major programs "intended to provide an income, health, nutrition, or social services benefit". Fraud can and does occur in such programs and because such fraud cases often involve relatively smaller sums of money, litigation in the district courts is often not cost-effective, thus making an alternate, administrative remedy particularly crucial. While we are sympathetic to the concern of some members that the administrative remedies provision not be used to unfairly

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harass the indigent and needy, we cannot support such a blanket exemption.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

[The following letter was received from the Legislative Committee of the President's Council on Integrity and Efficiency.]

U.S. SMALL BUSINESS ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL,
Washington, DC, June 9, 1986.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

Re: H.R. 4827, the "False Claims Amendments Act of 1986".

DEAR MR. CHAIRMAN: The Legislative Committee of the President's Council on Integrity and Efficiency (PCIE), representing the 18 statutory Inspectors General, commends your Committee and the Subcommittee on Administrative Law and Governmental Relations for its excellent work on H.R. 4827. Sec. 7 of H.R. 4827 would provide for an administrative remedy in cases of fraud against the United States. The statutory Inspectors General have enthusiastically endorsed this legislation, as evidenced by our Joint Statement submitted to the Subcommittee on February 5, 1986.

It has come to our attention that an amendment may be offered at Committee markup, which would seriously threaten the basic purposes of this bill, and we respectfully request that you consider our views on the subject. Our concerns relate to any amendment which would establish a limitation or "cap" (such as $100,000 or $200,000) on the amount of overall damages which could be recovered pursuant to Sec. 7. In our view, such a provision would be tantamount to a "license to steal" for those claimants who take over such amount, but whose cases are declined by the Department of Justice for civil action for reasons unrelated to the merits of the case. Also, the provision will likely be perceived as giving undue favoritism to defense and other large contractors, as opposed to smaller businesses. It makes the administrative remedy a "small business" remedy only.

We think it is critical that the Committee understands what the practical effect of the cap would be. The Department of Justice has the absolute discretion to take jurisdiction and proceed under the civil False Claims Act (31 U.S.C. Sec. 3729) in any action contemplated by a department or agency under Sec. 7 of H.R. 4827. However, the Department of Justice declines cases for False Claims Act treatment for a variety of reasons, where evidence nonetheless exists of a fraud on the government. The primary purpose of the bill is to address these cases. Further, under the Act the Department of Justice has the absolute discretion to approve or disapprove a proposed Program Fraud Civil Remedies Act proceeding. (H.R. 4827, page 43, lines 9–14) It is difficult to believe that the Department of Justice would approve any case for action under the bill which is abusive or which is not supported by evidence of fraud.

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In practical terms, the cap would affect only those cases which meet both of the following criteria: cases which are not accepted by the Department of Justice for False Claims Act treatment, and which would be approved by the Department of Justice for treatment under Sec. 7. With respect to these meritorious cases (not accepted by Justice, but approved by Justice for an administrative remedy), the cap would remove jurisdiction in those cases which involve substantial amounts of damages.

It is important to recognize that the cap would create a privileged case of wrongdoers, whose cases are declined by the Department of Justice for any number of reasons, and even though the Department of Justice would approve a Sec. 7 case, may not be brought because the damages are too high. If anything, it would encourage wrongdoers to "steal big" to avoid penalties and assessments under this Section.

It has been argued that Sec. 7 is intended to be a "little" False Claims Act, and that a cap would insure this result. Our point of view is that the legislation should be intended to address those cases which the Department of Justice declines to pursue under the False Claims Act, but where the evidence shows that fraud against the government has occurred. Thus, if enacted with an amendment for a cap, the Bill would create a significant "loophole" which exempts those wrongdoers whose cases happen to be declined by the Department of Justice and in which Sec. 7 action would not be possible due to the cap.

If the concern is that Federal departments and agencies are not capable of rendering fair and just treatment in cases involving large dollar amounts, such a proposition is totally at odds with the authorities Congress has already entrusted to a variety of executive departments and independent agencies. For example, the Office of Hearings and Appeals at the Department of Energy has been adjudicating the liability of major oil producers for penalties and overcharges of over one half billion dollars per case in some instances. A number of departments and agencies, such as Defense, Housing and Urban Development, Transportation and the National Aeronautics and Space Administration, employ Administrative Judges (ALJs) on Boards of Contract Appeals, who preside over contract disputes with no dollar limit over the amount in controversy. It is not at all uncommon for such claims to involve millions of dollars.

The Department of Labor administers several statutes (e.g., mine safety and health, fair labor standards and certain civil rights actions) which call for hearings before ALJs with amounts in controversy up to $8 million. The Department of Transportation awards international airline routes worth millions of dollars before ALJs. The Environmental Protection Agency administers Superfund and other litigation before ALJs with controversies worth tens of millions. The Grant Appeals Board, at the Department of Health and Human Services (HHS), staffed by board members appointed by the Secretary, adjudicates grant disallowances that commonly involve amounts in excess of $5 million, and as much as $100 million. Even the so-called "small" cases before ALJs at HHS, the Social Security disability cases, involve payments worth $74,000 on the average, discounted to current dollar value.

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In addition, many independent agencies adjudicate cases of considerable size and dollar value before ALJs. For example, ALJs at the Federal Energy Regulatory Commission have decided several cases where more than a billion dollars was at stake. The Federal Trade Commission adjudicates anti-trust suits directed at restructuring whole industries before ALJs. ALJs also adjudicate cases worth many millions of dollars at the Securities and Exchange Commission, Federal Communications Commission, International Trade Commission, and the Commodity Futures Trading Commission.

Finally, HHS's Civil Monetary Penalties Law (CMPL), 42 U.S.C. Sec. 1320a-7a, which has served as a prototype for the current Sec. 7, has functioned without a cap since 1981, but with approval required by the Department of Justice in each case. If the CMPL had a "cap," HHS would have been unable to proceed in a recent case against a Florida chiropractic "mill" in which HHS recovered $1.8 million. The estimated false claims resulting from the fraudulent practices in this case amounted to $1.6 million.

In summary, we urge that the administrative remedy in Sec. 7 be applicable to all fraud cases which are declined by the Department of Justice for prosecution under the False Claims Act, and which are approved by the Department of Justice for prosecution under this bill. Given the intent of the bill, we believe there is no valid rationale for a "cap," and we would vigorously oppose such an amendment in any form.

We deeply appreciate your consideration of our views.

Sincerely,

MARY F. WIESEMAN,
Chair, Legislative Committee,
President's Council on Integrity and Efficiency.

Members of the Legislative Committee:

William R. Barton, Inspector General, General Services Administration; Sherman M. Funk, Inspector General, U.S. Department of Commerce; John C. Martin, Inspector General, Environmental Protection Agency; Robert W. Beuley, Acting Inspector General, U.S. Department of Agriculture; Richard P. Kusserow, Inspector General, U.S. Department of Health and Human Services; and Mary F. Wieseman, Inspector General, Small Business Administration.

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